General Security Services Corporation *and* Alfred Cracolici. Cases 21–CA–31218 and 21–CA–31262

August 25, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

On June 30, 1997, Administrative Law Judge Albert A. Metz issued the attached decision. The Charging Party and the General Counsel filed exceptions and supporting briefs. The Respondent filed an answering brief. The General Counsel filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge found that Charging Party Cracolici, whom the Respondent employed as an assistant lead court security officer,[2] was a supervisor and that his transfer, demotion, suspension, and termination therefore did not violate Section 8(a)(3) and (1) of the Act. The General Counsel and the Charging Party have excepted to this finding. We find merit in these exceptions. For the following reasons, we find that Cracolici is *not* a supervisor and that the Respondent's treatment of Cracolici violated the Act.

In concluding that Cracolici was a supervisor,[3] the judge found that he had, and exercised, the authority to responsibly direct the Respondent's other court security officers (CSOs), and that he had, and exercised, the authority to discipline those CSOs. The judge also relied on his finding that Cracolici had the authority to schedule the work of other CSOs.

The Board has observed that, in enacting Section 2(11), Congress stressed that only persons with "genuine management prerogatives" should be considered supervisors as opposed to "straw bosses, leadmen . . . and other minor supervisory employees." *Chicago Metallic Corp.,* 273 NLRB 1677, 1688 (1985). Therefore, the Board has a duty to employees not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied . . . rights which the Act is intended to protect." Id. at 1689. Further, the burden of proving that an employee is a supervisor within the meaning of the Act rests on the party alleging that such status exists. Ibid.

We find, contrary to the judge, that the Respondent has failed to present sufficient evidence to establish that Cracolici possessed these Section 2(11) indicia of supervisory authority. With regard to Cracolici's alleged authority to schedule work, the record indicates that Lead CSO Phil Elder, an admitted statutory supervisor, prepared the work schedules in advance, and that Cracolici made only occasional and routine changes to them either in response to requests from the United States Marshal Service (USMS) or as required because of illnesses or vacations. Accordingly, he did not exercise "independent judgment" within the meaning of Section 2(11) with regard to scheduling work. *Auto West Toyota*, 284 NLRB 659 (1987) (parts manager not supervisor where his "scheduling" of other employees amounted only to an uncomplicated and regular rotation of them).

Similarly, although Cracolici testified that other CSOs asked him questions about their duties, he was unable to cite an instance in which this occurred or in which he responsibly directed the work of another CSO. Indeed, both Cracolici and Elder stated that the other CSOs needed very little supervision.

Although Cracolici speculated at the hearing, in response to hypothetical questions, as to what he might do if a serious problem arose with a member of the public, none of those hypothetical situations (e.g., a medical emergency) had actually occurred. Further, in the speculative example of a medical emergency, the action Cracolici suggested he might take (calling for medical assistance) would require no independent judgment and could be taken by anyone who happened to be at the scene.

As to discipline, the only examples Cracolici could cite were two oral reprimands. In both cases, he simply told CSOs to return to their assigned posts. He intimated no consequences in the event that they failed to do so. Neither incident was reported to Elder. Neither incident resulted in discipline or had any effect on the employees' jobs. This is the sum and substance of Cracolici's alleged "disciplinary authority."

Because Cracolici exhibited *no* primary indicia of supervisory authority, the secondary indicia (higher compensation, the perceptions of others, and the fact that, if Cracolici was not a supervisor, the CSOs were unsupervised at times) noted by the judge are not determinative. *Juniper Industries*, 311 NLRB 109, 110 (1993). In sum, we find that on this record, the Respondent has failed to sustain its burden of establishing that Cracolici was a

[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Respondent provides security services to the federal courthouse in Santa Ana, California, under a contract with the United States Marshal Service.

[3] The Act provides in Sec. 2(11) that:

> The term supervisor means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

supervisor within the meaning of Section 2(11) of the Act.[4]

As Cracolici was not a supervisor but an employee, it remains for us to decide whether his discharge (and, by extension, the earlier adverse actions taken against him by the Respondent) violated Section 8(a)(3) and (1) of the Act. As the judge found, the Respondent learned that Cracolici did not remain neutral during the union campaign as the Respondent had directed him to do. Rather, Cracolici supported the Union, favored employees who supported the Union, and shunned employees who did not. About 2 weeks before Cracolici's discharge, the Respondent suspended him. The letter of suspension stated, among other things, that Cracolici "participated and supported in an effort to bring a union into our work environment which was contrary to the directions you were given by management." Cracolici's termination letter stated that his . . . "actions during the recent campaign for the Union was such that you are no longer suitable to continue as a supervisor for this company." We also note that Andrew Pierucki, the Respondent's vice president, who made the decision to terminate Cracolici, testified that one reason for Cracolici's termination was that, "I think that he showed favoritism towards some of the employees that were trying to form a Union here. I think he actually participated in that." In these circumstances, we find that the General Counsel has made a prima facie showing that Cracolici's union activity was a motivating factor in the Respondent's treatment of him. *Wright Line*, 251 NLRB 1083 (1980), affd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

The Respondent contends that it would have discharged Cracolici even in the absence of his union activities because he violated its telephone-abuse work rule. We note that, although Cracolici's suspension letter mentioned this subject, his termination letter simply stated that his "actions during the recent campaign for a union were such that you are no longer suitable to continue as a supervisor for this company or our contract with the government." Because the General Counsel has made a showing sufficient to support the inference that protected conduct was a motivating factor in the Respondent's decision, the Respondent has the burden to show that it would have taken the same action even in the absence of the protected conduct. That is, in order to rebut the prima facie case, the Respondent cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *Roure Bertrand Dupont, Inc.,* 271 NLRB 443 (1984).

Although the judge did not actually find that Cracolici violated the Respondent's telephone policy, he did find that Pierucki concluded that Cracolici condoned the abuse of the government telephone assigned to the Respondent for official business. Even assuming that this belief on the Respondent's part constituted a legitimate reason for its actions towards Cracolici, we find that on the record before us the Respondent has failed to carry its burden of showing by a preponderance of the evidence that it would have taken the same actions in the absence of Cracolici's union activities. Accordingly, we find that the Respondent's treatment of Cracolici violated Section 8(a)(3) and (1) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, General Security Services Corporation, Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Transferring, demoting, suspending, or terminating Alfred Cracolici because of his union activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Alfred Cracolici full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Alfred Cracolici whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful transfer, demotion, suspension, and termination, and, within 3 days thereafter, notify Alfred Cracolici in writing that this has been done and that the transfer, demotion, suspension, and termination will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment re-

[4] As to the scheduling issue raised by our dissenting colleagues, although Cracolici made occasional minor and routine changes to already-prepared schedules, as occasioned by absences and requests by the USMS, there is no evidence that these minor changes in the schedule were anything but routine or otherwise required the exercise of independent judgment. Nor is there evidence that Cracolici exercised independent judgment in assigning overtime, whether that overtime was occasioned by illness or USMS needs. Moreover, although our dissenting colleagues correctly point out that Cracolici was often at the worksite when Elder was not, his mere presence is insufficient to sustain the Respondent's burden of proving that he engaged in activities that might qualify him as a statutory supervisor. See, e.g., *Billows Electric Supply*, 311 NLRB 878, 879 (1993).

cords, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Santa Ana, California, and Los Angeles, California, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 29, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

CHAIRMAN GOULD, concurring.

I agree with my colleagues that Assistant Lead Court Security Officer Cracolici is not a supervisor within the meaning of Section 2(11) of the Act and that the Respondent violated Section 8(a)(3) and (1) by transferring, demoting, suspending and discharging him because of his union activities. I write separately because I would find violations of Section 8(a)(1) even if Cracolici were a statutory supervisor.

The judge, having found that Cracolici was a supervisor, dismissed the complaint under *Parker-Robb Chevrolet*, 262 NLRB 402 (1982), affd. sub nom. *Automobile Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 888 (D.C. Cir. 1988), a decision where the Board first announced the test to resolve supervisory discharge cases. I do not subscribe to this test. Instead, I would extend the protection of the Act to supervisors when the discharge has a chilling effect on employees' rights to engage in protected or union activities and when their supervisory status is uncertain and they engage in protected or union activity in the good-faith belief that they are statutory employees protected by the Act. I address each of these issues in turn.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

First, I would not grant the Respondent immunity from its actions against Cracolici under the test set out in *Parker-Robb*, but would find these actions unlawful because of their chilling effect on employees' rights to engage in concerted or union activity. In this regard, in *Parker-Robb*, 262 NLRB at 404, the Board announced that:

> The discharge of supervisors as a result of their participation in union or concerted activity—either by themselves or when allied with rank-and-file employees—is *not* unlawful for the simple reason that employees, but not supervisors, have rights protected by the Act. [Emphasis in original.]

In overruling contrary precedent,[1] the Board explained that while "the discharge of a supervisor for engaging in union or concerted activity almost invariably has a secondary or incidental effect on employees," such an effect is "insufficient to warrant an exception to the general statutory provision excluding supervisors from the protection of the Act." Id. at 404. The Board added that:

> [I]t is irrelevant that an employer may have hoped, or even expected, that its decision to terminate a supervisor for his union or concerted activity would cause employees to reconsider, and perhaps abandon, their own concerted or union activity. No matter what the employer's subjective hope or expectation, that circumstance cannot change the character of its otherwise lawful conduct.[2]

Thus, the Board announced, in effect, that even when an employer's "decision to terminate a supervisor for his union or concerted activity would cause employees to reconsider, and perhaps abandon, their own concerted or union activity," such a chilling of employees' Section 7 rights has no more than an "incidental or secondary effect on the employ-

[1] See, e.g., *Brothers Three Cabinets*, 248 NLRB 828, 828–829 (1980), and *Fairview Nursing Home*, 202 NLRB 318, 324 fn. 34 (1973). As explained in *Pontiac Osteopathic Hospital*, 284 NLRB 442, 443 (1987):

> In *Parker-Robb* [the Board] overruled the "integral part" or "pattern of conduct" cases in which [it] had held that the discharge of a supervisor, as part of an overall plan to discourage employees from exercising their Section 7 rights, violated the Act. While recognizing that the discharge of a supervisor for engaging in union or concerted activity almost invariably has a secondary or incidental effect on employees, [the Board] reasoned that such conduct is insufficient to warrant an exception to the general statutory provision excluding supervisors from the protection of the Act.
>
> For the reasons set forth in my dissent, I would find that when the discharge of a supervisor has a chilling effect on the Sec. 7 rights of statutory employees, the discharge is unlawful. In my view, the determination of this issue is best decided by an examination of the facts in each case and without reliance on "magic" terms such as "integral part" or "pattern of conduct." Accordingly, I refrain from using these terms here.

[2] *Parker-Robb Chevrolet*, 262 NLRB at 404 (fn. omitted).

ees" and therefore does not render the discharge of the supervisor unlawful. Id. I hold a different view of the Act.

As I have previously explained elsewhere,[3] I would find that discrimination against a statutory supervisor violates the Act when it reasonably may be inferred that the discrimination will chill the concerted or union activities of statutory employees. In my view, discrimination by an employer that has the effect of coercing employees to abandon their protected or union activities should never be construed as lawful on the ground that the employees' abandonment of protected or union activities is merely an "incidental or secondary effect" of such discrimination. To the contrary, the chilling of employees' rights to organize and to participate in union activities goes to the very heart of the Act and undermines the very employee rights which the *Parker-Robb* Board purported to protect. In this regard, I find it inherently contradictory for the Board to rely on the proposition that "employees, but not supervisors, have rights protected by the Act," when the result of such a reliance is to leave employers free to chill the rights of statutory employees with impunity. Accordingly, for these reasons, I would overrule *Parker-Robb* and find that an employer violates the Act when it reasonably may be inferred that its discharge of a statutory supervisor has a chilling effect on the concerted or union activities of statutory employees. Such an inference is clearly warranted here. Accordingly, I would find that the Respondent's discharge of Cracolici violated Section 8(a)(1) of the Act even assuming Cracolici was a statutory supervisor.

In finding that the Respondent's discharge of Cracolici had a chilling effect on the union activities of unit employees, I emphasize that Cracolici actively participated in the employees' efforts to seek union representation and that the Respondent discharged him specifically because of his union activities. Statutory employees could reasonably fear that they would suffer the same fate as Cracolici if they persisted in their efforts to seek union representation.

Even when a supervisor's discharge does not have a chilling effect on other employees, the supervisor may still enjoy the protection of the Act under certain circumstances not present here. Where an individual's status as a statutory supervisor is genuinely uncertain and is contested before the Board in a union organizational campaign, that individual does not lose the protection of the Act if, in effect, he guesses wrong and is subsequently determined to be a statutory supervisor. I do not believe that extending the protection of the Act to such individuals would undermine the objective which Congress intended when in 1947 it amended the definition of "employee" in Section 2(3) to exclude those denominated as supervisors under Section 2(11).[4] In this regard, in *Beasley v. Food Fair of North Carolina*, 416 U.S. 653, 661-662 (1973), the Supreme Court, after reviewing the legislative history of the relevant amendments, stated that:

> This history compels the conclusion that Congress' dominant purpose in amending §§ 2(3) and 2(11) . . . was to redress a perceived imbalance in labor-management relationships that was found to arise from putting supervisors in the position of serving two masters with opposed interests.

As the Court explained, Congress excluded supervisors from protection under the Act "because [they] were management obliged to be loyal to their employer's interests, and their identity with the interests of rank-and-file employees might impair that loyalty . . . ." Id. at 659–660. Since I would find protected only the union activities of employees whose supervisory status is uncertain at the time they engage in such activities, it follows that their obligation to be loyal to management is not yet clearly established and therefore their union activity would not "impair" that loyalty. In these circumstances, an employer risks relatively little if it awaits impartial resolution of the supervisory issue before insisting that the employee, if found to be a supervisor, cease from union activity.

On the other hand, under current law it is the employee whose supervisory status is in doubt who must risk everything when, upon an employer's mere assertion that the employee is a supervisor, the employee must choose either to surrender his Section 7 right to engage in protected or union activity or to subject himself to possible discharge by continuing to engage in that activity. Further, employees' union activities are adversely affected even if they are ultimately found not to be supervisors. Thus, to the extent employees fear they may be found to be supervisors they are inhibited in the exercise of their rights under the Act. Additionally, the rest of the unit is impacted by not having the benefit of the full participation of the affected employees. I would remove this risk by finding unlawful an employer's demand that an employee cease his protected or union activity and any discipline imposed if the action was taken as a result of such activities prior to a Board determination of his job status. The facts here, however, do not appear to warrant this approach.

[3] See *Cincinnati Truck Center*, 315 NLRB 554, 556 fn. 11 (1994).

[4] Sec. 2(3) provides in pertinent part:

> The term "employee" shall include any employee . . . but shall not include . . . any individual employed as a supervisor . . . .

Sec. 2(11) provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Cracolici's status was not contested in the union's organizational campaign. The stipulated election agreement specifically excluded Cracolici's position, Assistant Lead Court Security Officer, from the bargaining unit. Cracolici did not attempt to vote in the election and had been instructed by the Respondent to remain neutral in matters involving the election. Cracolici, therefore, is not an individual who held a good-faith belief that he was an employee entitled to the protection of the Act who expected his status to be resolved by the Board at the time of the election.

Accordingly, assuming Cracolici's supervisory status, I would find that the Respondent actions toward him violated Section 8(a)(1) because of their chilling effect on employees' rights to engage in protected or union activities. As noted earlier, I also fully agree that Cracolici is not a supervisor for the reasons set forth in the majority opinion and that the Respondent's treatment of him violated Section 8(a)(3) and (1) of the Act.

MEMBERS HURTGEN AND BRAME, dissenting.

The issue here is whether the Charging Party, Alfred Cracolici, was a statutory supervisor, and therefore outside the protection of the Act, when the Respondent discharged him for engaging in union activity.

Finding that the Respondent had satisfied its burden of showing that Cracolici was a statutory supervisor, the judge further found that the Respondent did not violate the Act when it discharged him for engaging in union activity.[1] The judge therefore dismissed the complaint. The majority, reversing the judge, finds that Cracolici was a statutory employee and that the Respondent violated Section 8(a)(3) and (1) by discharging him. We disagree.

The Respondent operates a security guard business. As part of that business, the Respondent, under a contract with the United States Marshal Service, furnishes security guards, called Court Security Officers (CSOs), to certain federal courthouses in southern California, including the Santa Ana Federal Court House at issue here. A lead CSO, the highest ranking official of the Respondent at the work site, supervises the CSOs. At sites that employ more than 10 CSOs, such as the Santa Ana facility, an Assistant Lead CSO assists the Lead CSO. At all times relevant, Phil Elder was the Lead CSO at the Santa Ana facility and Cracolici was the Assistant Lead CSO. It is admitted that Elder was a statutory supervisor. As explained above, the issue here is whether Cracolici was also a statutory supervisor.

In his analysis of this issue, the judge correctly found that Cracolici was in charge of courthouse security at the Santa Ana Federal Court House after Lead CSO Elder left each day at 1:30 p.m. Since Cracolici stayed at work until approximately 6 p.m., he was, in fact, in charge of courthouse security for approximately 4.5 hours each day. Further, in our view, the judge also correctly found that certain facts—(1) that the Respondent's contract with the Marshal Service required the Respondent to have a supervisor on duty during periods of public access to the courthouse, i.e., until 6 p.m. each day, and (2) that Cracolici, as the Respondent's highest ranking official at the court house after 1:30 p.m., satisfied this supervisory requirement—support a finding that Cracolici was a supervisor within the meaning of the Act.

That Cracolici's status was indeed that of a statutory supervisor when he was in charge of the courthouse is evidenced by the fact that in Elder's absence Cracolici would schedule and assign the work of the CSOs. Thus, although Elder may have prepared work schedules in advance, there were times when the Marshal Service would request changes after Elder had left. Cracolici had the authority to decide how to comply with those requests.

Cracolici's authority to assign overtime further evidences Cracolici's status as a statutory supervisor. In this regard, Elder testified, without contradiction, that when Cracolici was in charge of courthouse security, he had the authority to call in CSOs, which call-ins could result in overtime pay. See, e.g., *Sun Refining Co.,* 301 NLRB 642 fn. 2 (1991) (authorizing and assigning overtime is a supervisory function under Section 2(11)).

Further, as the Respondent's highest ranking official at the facility for much of the day, Cracolici had the authority to act for the Respondent if a serious problem or an emergency arose. Such action would include the direction of the CSOs in their response to the problem or emergency. Although the majority attempts to disparage Cracolici's *use* of such authority on the ground that no

[1] In finding that Cracolici's discharge did not violate the Act, the judge cited *Parker-Robb Chevrolet,* 262 NLRB 402 (1982), affd. sub nom. *Automobile Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 888 (D.C. Cir. 1988). In *Parker-Robb*, 262 NLRB at 404, the Board explained that "[t]he discharge of supervisors as a result of their participation in union or concerted activity . . . is *not* unlawful for the simple reason that employees, but not supervisors, have rights protected by the Act." (Emphasis in original.) We agree with the judge that the Board's decision in *Parker-Robb* is applicable here and that under that decision statutory supervisor Cracolici's discharge would not be unlawful.

We find without merit Chairman Gould's criticism of *Parker-Robb* and reject his attempt to extend the protection of the Act to statutory supervisors who are discharged for engaging in union activity. As stated in *Parker-Robb*, 262 NLRB at 402 (fn. omitted), "down through the years the Board has consistently held that a supervisor may be discharged for union activity." We would find that that is all that has happened here. To find such conduct unlawful, we would be required to look beyond the conduct, lawful in itself, and find it unlawful on the basis of the consequences of that conduct, i.e., whether it had an adverse effect on employees. For the reasons articulated in *Parker-Robb*, we decline to adopt such an analysis. Finally, we reject Chairman Gould's attempt to find that the discharges of supervisors would be unlawful if their supervisory status were uncertain prior to the Board's resolution of that issue. As Chairman Gould notes, Congress amended the definition of "employee" in Sec. 2(3) of the Act to exclude "supervisors." Congress did not contemplate extending the protection of the Act to a further category of "gray-area" supervisors, and we decline the Chairman's invitation to fashion such a category now.

such emergency had yet arisen, their arguments do not alter the fact that Cracolici *possessed* such authority. We find that this factor also supports a finding that Cracolici was a statutory supervisor.[2]

Contrary to the suggestion of our colleagues, our view that Cracolici was a statutory supervisor is not based on his "mere presence" at the work site when supervisor Elder was absent. Rather, we emphasize that Cracolici was in charge of the Respondent's operations in Elder's absence, that he was the highest-ranking onsite representative of the Respondent at those times, and that his responsibilities included the summoning of additional CSOs as needed, which could result in overtime pay. Those responsibilities also included changing work schedules. With particular reference to this last responsibility, the Marshal Service would request changes, but the decision as to what changes were to be made was entirely up to Cracolici.

Finally, our finding that Cracolici was a statutory supervisor is further evidenced by the presence of "secondary" indicia of Cracolici's supervisory status, i.e., Cracolici was paid more than the rank-and-file CSOs, and he was perceived as a supervisor by them.

For all these reasons, we agree with the judge that Cracolici was a statutory supervisor. Accordingly, we would dismiss the complaint.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT transfer, demote, suspend, discharge, or otherwise discriminate against any of you for supporting the International Union, United Government Security Officers of America, Local 74 or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Alfred Cracolici full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his transfer, demotion, suspension, and discharge, less any net interim earrings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful transfer, demotion, suspension, and discharge of Alfred Cracolici, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the transfer, demotion, suspension, and discharge will not be used against him in any way.

GENERAL SECURITY SERVICES CORPORATION

Ami Silverman, Esq., for the General Counsel.
Robert A. Boonin, Esq., for the Respondent.
Alfred Cracolici, for the Charging Party.

DECISION

INTRODUCTION

ALBERT A. METZ, Administrative Law Judge. This case was heard at Los Angeles, California, on April 7–8, 1997.[1] Alfred Cracolici, an individual, has charged that General Security Services Corporation (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act) by transferring, demoting, suspending, and terminating him. I find that Cracolici was a supervisor within the definition of the Act and that Respondent's actions did not violate the Act.

The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the International Union, United Government Security Officers of America and it Local 74 (jointly referred to as the Union) are labor organizations within the meaning of Section 2(5) of the Act.

I. BACKGROUND

The Respondent operates a security guard business. Part of that business provides security services at Federal courthouses throughout the country including the southern California area. This function involves protecting the Federal judiciary, court employees, and the public, including jurors. The Respondent is responsible for protecting the Federal courthouses in Los Angeles, San Bernadino, Pasadena, Santa Ana, and Santa Barbara, California. The Respondent's work is performed under contract with the United States Marshal Service (USMS). Respondent's guards are called Court Security Officers (CSOs) and they are supervised by a Lead CSO who is the highest ranking company official on the worksite. Typically at sites that employ more than 10 CSO's an Assistant Lead CSO is employed to assist the Lead CSO. This was the situation at the Santa Ana Federal Courthouse and Federal Office Building complex in April

[2] Cf. *Quadrex Environmental Co.,* 308 NLRB 101, 101 (1992), where the Board found that leadmen were not statutory supervisors because, inter alia, if the leadmen encountered nonroutine problems, they had to report them. By contrast, Cracolici had the authority to act on the Respondent's behalf if a nonroutine problem arose.

[1] All subsequent dates refer to 1996 unless otherwise stated.

1995. At that time Lead CSO, Phil Elder, was in charge of the Santa Ana courthouse. Charging Party Cracolici worked under Elder as the Assistant Lead CSO. Elder had appointed Cracolici as his assistant to substitute for Herb Johnson who was on an extended medical leave. It was apparent as early as August 1995 that Johnson would not be able to return to work. Cracolici thus worked as the Assistant Lead CSO for 11 months from April 1995 until his discharge in March 1996.

The Respondent's District Supervisor is Richard Caven who oversees several courthouse locations in southern California. Caven was responsible for supervising Elder and Cracolici. Caven's office is located in Los Angeles. The Government's complaint alleges, and the Respondent admits, that Elder and Caven are supervisors within the meaning of Section 2(11) of the Act.

In late 1995 and early 1996 the Union was attempting to organize the CSO's at the Santa Ana courthouse. Eventually an election was scheduled for January 25, 1996. The stipulated election agreement specifically excluded Lead and Assistant Lead CSOs from the bargaining unit. Cracolici did not attempt to vote in the election and had been instructed by the Respondent through Elder that they both were to remain neutral in matters involving the election. They were only to discuss the Union with CSOs if the employee had a question about the matter.

II. RESPONDENT'S INVESTIGATION

In January the Respondent received a complaint from the USMS that there may be problems with CSOs at the Santa Ana courthouse misusing the government telephone, and perhaps other problems. A supervisor, James Russell (who did not work at the Santa Ana courthouse) was assigned to investigate the complaints. He interviewed the Santa Ana personnel and this resulted in the Respondent learning that some employees may have abused telephone privileges. Additionally, it was learned Cracolici may have solicited support for the Union in the election campaign, made derogatory remarks about the Respondent, and behaved abusively towards two women CSOs under his supervision.

III. CRACOLICI'S TRANSFER, DEMOTION, AND SUSPENSION

On February 29, Caven issued a memo notifying the employees that a new lead and assistant lead were assuming those duties at the Santa Ana courthouse commencing March 4. Cracolici was told to report to the Los Angeles office and on March 4 he met with District Supervisor Caven who gave him a letter of suspension. Cracolici was suspended pending further investigation of his recent conduct. The letter listed several problem areas including his and subordinates' telephone abuse, making statements against the Respondent, and showing favoritism towards certain employees. The letter also alleged he "participated and supported in an effort to bring a union into our work environment which was contrary to the directions you were given by management." Cracolici was invited to submit a written reply to the listed allegations. He prepared such a reply and this was considered by management in making its decision to terminate him. While Cracolici denied he did anything that was supportive of the Union's organizational efforts, I do not credit his denials. The credited evidence and testimony establish that Cracolici was vocal in supporting the Union and abusive to subordinates who disagreed with his opinion.

IV. DISCHARGE

On March 14 the Respondent terminated Cracolici.[2] The termination decision was made by Andrew Pierucki, Respondent's vice president, who offices in Minneapolis, Minnesota. Pierucki testified that he made the decision to terminate Cracolici after a review of the information that was submitted to him. This included supervisor Russell's investigation reports, employee statements, and Cracolici's written response. Pierucki did not find Cracolici's response was truthful and considered it to be confrontational and evasive rather than responsive to the inquiry. Pierucki concluded that Cracolici condoned the abuse of the government telephone assigned to the Respondent for official business. Pierucki believed that Cracolici showed favoritism towards some of the employees that were pro-union. This included condoning CSOs using Government and company time to conduct Union business. Pierucki also determined that Cracolici abused some employees by his refusal to communicate with them. Pierucki was very concerned by the complaints of two women CSOs (detailed more fully below) that they were going to file EEOC charges against Cracolici because of his abusive behavior towards them. Pierucki concluded that the totality of Cracolici's conduct required his termination. Cracolici's termination letter states that his "actions during the recent campaign for the Union were such that you are no longer suitable to continue as a supervisor for this company" Thus, Cracolici was terminated on March 14.

V. THE CSO'S WORK AND SUPERVISION

All CSOs are deputized by the Government to serve as Deputy U.S. Marshals. They are armed and have arrest powers. The CSOs perform duties of checking the public entering the courthouse, providing roving patrols, courtroom security, guarding juries, and other tasks requested by the USMS. CSOs are assigned on an hourly basis to either occupy a stationary post (e.g., the X-ray machine at the courthouse entrance) or a roving post (e.g., patrolling the hallways and courtrooms). This scheduling was done by Elder, Cracolici, and a CSO who was adept at arranging the schedule on his computer. Approximately 17 CSOs were supervised by Elder and Cracolici.

The contract between the U.S. Marshal Service and the Respondent states in pertinent part:

> 3.2.2 On-Site Supervision
>
> [T]he Contractor shall employ a Supervisory/Lead CSO at each facility to provide supervision on a daily basis. This person shall, at a minimum, be responsible for coordinating with the U. S. Marshal or his designee at that facility on a daily basis:
>
> i. to determine any changes which may be required that day;
>
> ii. to assure all CSOs are in proper uniform, and all Government property is accounted for;
>
> iii. to provide a degree of supervision for the daily working of the CSOs;
>
> iv. to be contact between the Contract Supervisor/Manager and the U.S. Marshal or his designee.
>
> In most cases, this "Lead CSO" shall function simultaneously as a full-time working CSO. Where 24-hour coverage exists, it shall be necessary to provide one or more assistant Lead

[2] Elder was demoted at the same time.

CSO to provide supervisory coverage on *all* shifts. (Emphasis added.)

The Santa Ana CSOs work shifts that cover a period from 5 a.m. to 10 p.m. The public hours of the Santa Ana Courthouse are approximately 7 a.m. until 6 p.m. Elder typically worked from 5 a.m. until 1:30 p.m. because certain judges started work at 5:30 a.m. Cracolici commonly started work at 9:30 a.m. Cracolici testified that, "After Elder left at 1:30 p.m. I took over his duties as Lead CSO. When employees needed guidance while Elder was out they would call me." A number of CSOs did not start work until 2 p. m.

Cracolici did some daily log reports which document the employees that worked on particular days and how long they worked. He would request additional personnel from upper management to staff his courthouse. He occasionally approved vacation payments to employees but did not give them the vacation time off. Cracolici would assist Elder in the preparation of scheduling employees. When Elder was not working the scheduling would be done by Cracolici or a CSO who was skillful at the task. The prior schedule was usually used as the basis for the new schedule requiring only a minimal amount of changes.

Cracolici testified that he reprimanded CSOs as needed and recited two instances. He considered one of the instances to be a particularly serious situation. The reprimand resulted from the CSO being away from his post in the Clerk's office. The officer was in a position where he could not see his post. At times when Elder was not at the courthouse CSO's would come to Cracolici with questions about their duties. Cracolici would use Elder's office to write his reports and to use the telephone.

Cracolici admitted that Elder told him that there was going to be a union election, and that the two of them, as part of management, would not be able to vote. He was instructed not to talk about the election unless someone asked him a question. Cracolici recalled that on about 20 occasions employees came to him wanting to discuss the Union. He denied ever encouraging any employee to support the Union.

Elder testified that Cracolici's job responsibility was to run his end of the shift and make sure that CSOs were doing their jobs and to be in charge at times when Elder was not present. Elder stated the USMS would contact the Lead or Assistant Lead CSO if they had any problems with security and would expect them to take care of the problems. When Cracolici was in charge he was the direct contact with the USMS. If the USMS had additional security needs it was up to the Lead or the Assistant Lead to staff that security which could result in overtime pay. If there was a serious problem with a member of the public the Lead or the Assistant Lead was to oversee the situation. Elder noted that when Cracolici was promoted to the Assistant Lead position he received a 90-cent-per-hour wage increase. His radio call sign was changed to reflect that he was "S2" or the supervisor under Elder.

CSO Lumila Wren testified that she considered Cracolici to be a supervisor, because "he's the supervisor that gave us orders, gave us the direction." Wren observed Cracolici also doing some of the scheduling. She complained that Cracolici was leaving early on occasions and was thus not available to the CSOs. Wren stated in writing during the Respondent's investigation that Cracolici was the evening supervisor and when he left early this caused problems because there were times when decisions had to be made such as who would be assigned to work overtime if a court was going to be in session late. (R. Exh. 3.) Wren noted that Cracolici was available to answer questions and was on roving patrol more frequently than other officers in order to keep track of the overall security situation in the two Santa Ana buildings. Wren recalled discussing the Union in front of Cracolici in approximately December 1995 and expressing her opinion that she did not favor union representation. Cracolici told her, "You women don't understand anything." Thereafter Cracolici became very hostile towards her. This hostility was expressed in part by refusing to answer her questions and walking away from her. Wren noted that her assignments changed so she was given long periods on fixed posts which was highly unusual. Prior to the union discussion with Cracolici she would get a couple of roving assignments a day. At one point she went to Cracolici and told him she wanted to discuss her scheduling. He refused to speak to her and walked away. She testified that CSOs who favored the Union were getting the roving assignments. She complained of her treatment to Elder who said he would check into the matter. They discussed the situation later and Elder's reply was that she knew Cracolici and he did what he wants. Wren told Elder that she and CSO Marjorie Appel were prepared to file an EEOC complaint about the hostile work environment to which Cracolici was subjecting them.

CSO, Marjorie Appel, testified that her regular shift was 2 p.m. to 10 p.m. and that she rarely saw Elder who typically left at 1:30 p.m. She stated that she considered Elder and Cracolici to be supervisors who were responsible for enforcing work rules and possibly disciplining employees if they violated work rules. Appel noted that they were the highest company authority on the worksite. Appel also had discussions with Cracolici about the Union. She told him that she was not sympathetic to the organizational drive. Corroborating Wren's testimony, Appel likewise experienced Cracolici refusing to speak to her after she expressed her lack of enthusiasm for the Union. She considered his treatment to be abusive and talked to Wren about their filing a discrimination complaint with the EEOC.

Andrew Pierucki, Respondent's vice president, testified that in the absence of the Lead CSO an Assistant Lead CSO is the highest ranking company official at a courthouse. Leads are responsible for directing employees and being in charge during any emergency. Pierucki emphasized the seriousness of the CSO's duties and noted that two of Respondent's CSOs had been killed in the line of duty. Pierucki testified that because of the gravity of the work it was important to have supervisors in place, particularly during the public hours when there is the highest likelihood of an emergency. Pierucki stated that the supervisory requirement of having Assistant Lead CSOs was mandated by the USMS in the contract and that they was responsible for the supervision of the CSOs.

VI. ANALYSIS OF THE SUPERVISORY ISSUE

The Government contends that Cracolici was not a supervisor within the Act's definition and that his discharge which, in part, was motivated by his union activity was a violation of the Act. The Respondent asserts that Cracolici was a statutory supervisor and his union activities did not protect him from discharge. Section 2(11) defines a supervisor as: "Any individual having authority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such

authority is not of a merely routine or clerical nature, but requires the use of independent judgment." The burden of proving supervisory status rests with the party who alleges its existence. *Health Care Corp.*, 306 NLRB 63 fn. 1 (1992).

Cracolici was the only supervisor present on a daily basis after Elder left at 1:30 p.m. Cracolici would also be solely responsible for the courthouse security at times when Elder was absent from work for reasons such as vacations, management meetings, or illness. Cracolici had the authority to schedule and direct the work of CSOs. He had the authority to discipline CSOs and cited instances when he did verbally reprimand employees. He was responsible for being the Respondent's representative to the USMS when Elder was absent and work assignments had to be accommodative to USMS's needs.

Cracolici received a 90-cent-per-hour wage increase when he was appointed Acting Assistant Lead CSO. He was assigned a supervisory radio call as Assistant Lead CSO. He directed the work of the CSOs as he saw appropriate and the staff viewed him as a supervisor. The need for supervision of the CSOs, especially during public hours, was readily demonstrated. The CSOs are armed deputy U. S. Marshals. The Respondent has had two CSOs killed in the line of duty. The CSOs perform a vital service in protecting the courthouses from serious threats. If Cracolici were not found to be a supervisor the CSOs would be unsupervised during half of the day while providing this critical courthouse protection.

The contract with the USMS, while not dispositive of Cracolici's supervisory status, is supportive of the intent that he was to work as supervisor within the meaning of the Act. The USMS requires that the Respondent have a supervisor on duty during the court's public hours. I find that Cracolici had the authority to responsibly direct the CSOs and exercised that authority. Additionally, I find that Cracolici had and exercised the authority to discipline employees.

The Respondent received reports that Cracolici was supporting the Union's organizational efforts, and, contrary to instructions, was not remaining neutral during the campaign. The Respondent chose to credit these reports over Cracolici's denial that he had engaged in any union activity. I likewise do not credit Cracolici when he denies that he engaged in union activity. I found the testimony of CSOs Appel and Wren to be credible that Cracolici supported union representation, and shunned them because they did not share his views.

I find that the Respondent has met the burden of showing that Cracolici was employed as a statutory supervisor. I further find that because of his supervisory status the Respondent did not violate the Act when it discharged him. *Parker-Robb Chevrolet, Inc.,* 262 NLRB 402, 404 (1982).

CONCLUSIONS OF LAW

1. General Security Services Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Union, United Government Security Officers of America and its Local 74 are labor organizations within the meaning of Section 2(5) of the Act.

3. The Charging Party, Alfred Cracolici, at all material times was employed by the Respondent as a supervisor within the meaning of Section 2(11) of the Act and his transfer, demotion, suspension, and termination did not violate the Act.

[Recommended Order for dismissal omitted from publication.]